UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Steven Pollack, Plaintiff, v. United States **Department of Defense**, **Donald Rumsfeld** as Secretary, United States **Department of the Army**, **Francis Harvey** as Secretary, United States **Department of the Navy**, and, **Donald Winter** as Secretary Defendants.	No. 06 C 2659 Judge Manning

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff asks this Court to issue a temporary restraining order and a preliminary injunction to prevent imminent and irreparable harm to Plaintiff from the demolition of existing housing and construction of new housing on the contaminated federal property illegally transferred by Defendants. Defendant Navy began demolition for this redevelopment project in July 2006 as part of Navy's public/private venture (PPV) entered into with Forest City Military Communities, LLC in December of 2005.

I. PLAINTIFF SHOULD BE GRANTED A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE HARM FROM DEFENDANTS THREATENED CONSTRUCTION ON ILLEGALLY TRANSFERRED CONTAMINATED FEDERAL PROPERTY

Plaintiff meets the requirements of the analytical framework adopted by the Seventh Circuit for granting a preliminary injunction: (1) without an injunction Plaintiff will suffer serious, irreparable injury for which there is no adequate remedy at law; (2) the irreparable harm

that Plaintiff will suffer from an erroneous denial of injunction outweighs the harm to the Defendants from an erroneous grant of injunction; (3) after weighting the harms by Plaintiff's high likelihood of success on the merits; and (4) granting the injunction is in the public interest. Plaintiff should therefore be granted a preliminary injunction enjoining Defendant Navy and its PPV partner in Midwest Family Housing LLC., Forest City Military Communities LLC., from demolishing old housing and building new housing until the conclusion of this case on the merits.

A request for preliminary injunction requires the court to balance the risk to plaintiff by an erroneous denial of injunction, against the risk of error to the defendant by an erroneous grant. *See American Hospital Supply Corp. v. Hospital Products Ltd.,* 780 F.2d 589, 593 (7th Cir. 1986). In a challenge to an administrative action in which a decision will be on review of the administrative record without trial, only a narrow set of circumstances will cause the kind of delay that justifies a preliminary injunction. *See Cronin v. U.S. Dept. of Agriculture,* 919 F.2d 439, 443-47 (7th Cir. 1990).

The Seventh Circuit uses a sliding scale approach that compares plaintiff's harm from an erroneous denial of injunction to defendants harm from an erroneous grant and then weights each harm by the party's likelihood of success on the merits. *See Roland Machinery Co. v. Dresser Industries Inc.,* 749 F.2d 380, 385-88 (7th Cir. 1984). This circuit has reworked Judge Learned Hand's well known tort formula to help analyze these issues. *See United Stated v. Carroll Towing Co.,* 159 F.2d 169, 173 (2d Cir. 1947); *American Hospital,* 780 F.2d at 593; *see also Lawson Products, Inc., v. Avnet, Inc.,* 782 F.2d 1429, 1436 (7th Cir. 1986) (formula simply an analytic tool, not a replacement for sound judicial discretion). A preliminary injunction should issue if P * Hp > (1-P) * Hd: where P is plaintiff's probability of success at trial expressed as a

percentage, 1-P is simply defendant's inverse probability of success expressed as a percentage (the total equaling 100%), Hp is the value of irreparable harm to plaintiff from erroneous denial of injunction, and Hd is the value of irreparable harm to defendant from erroneous grant of injunction. *American Hospital*, 780 F.2d at 593-94. The public interest can be added to either party's harm as equity requires. *American Hospital*, 780 F.2d at 601. The greater plaintiff's irreparable injury from prolonged court proceedings, the less he must show a likelihood of success on the merits. Conversely the greater the likelihood of success on the merits that plaintiff can show the less irreparable harm he must prove in order to justify a preliminary injunction. *Roland Machinery*, 749 F.2d at 387-88.

Because there is typically little delay in a court proceeding that is a review of the administrative record, a preliminary injunction is usually not necessary to protect plaintiff from irreparable harm associated with trial delay. The Seventh Circuit, however, has enumerated three instances where this presumption of no delay is inapplicable and a preliminary injunction may be granted:

> (1) If the administrative record is so vast or complicated that the district judge cannot analyze it and make his final decision in time to avert harm to the plaintiff due to delay, then the plaintiff can move for a preliminary injunction....
>
> (2) Likewise the plaintiff can seek a preliminary injunction against the execution of the administrative decision if the record is incomplete when suit is filed and if, as in (1) time is pressing....
>
> (3) Or, what is closely related, a preliminary injunction may be proper if the case is one of the unusual administrative review cases in which an evidentiary hearing is necessary in order to reconstruct the grounds or contents of the agency's decision and the alternative of

staying the review proceeding for further administrative action is infeasible-presumably because, once again, of time.

Cronin, 919 F.2d at 446-47.

A. Plaintiff Has No Adequate Remedy At Law And Will Suffer Irreparable Harm

Because plaintiff is not seeking a remedy at law but rather the remedying of government violations of substantive environmental laws, there is no compensation available for irreparable harm caused by trial delay. There is, therefore, no adequate remedy at law for Defendants' continued violation of deed and lease transfer prerequisites under 42 U.S.C. § 9620(h)(3)(A)-(B).

Plaintiff will suffer irreparable harm if Defendant is allowed to upset the status quo by continuing demolition and construction of housing, in and around Landfill 6 & 7, pending review of the administrative record leading to Defendants' decisions to transfer contaminated federal property without having 1) completed all remedial action and 2) demonstrated to U.S. EPA the completed remedy is operating properly and successfully as required by § 9620(h)(3)(A)-(B), or 3) consulted with U.S. EPA on the suitability of leasing the contaminated federal property as required by § 9620(h)(3)(B).

Plaintiff articulates three separate irreparable harms: harm to the statutory scheme, harm to the decision to seek a covenant from U.S. EPA, and harm to the analysis of feasible alternatives in selecting the final remedial action.

1. Harm To The Statutory Scheme

The harm to the statutory scheme is closely related to Plaintiff's high likelihood of success on the merits because Defendants' actions in avoiding obligations under § 9620(h)(3)(A)-(B) are illegal and willful. In fact, Defendants come to this action with unclean hands.

Defendants have been on notice for years of the requirement to obtain a covenant by U.S. EPA warranting that all remedial action has been taken and is operating properly and successfully prior to transferring contaminated federal property by deed. *See Conservation Law Foundation, Inc. v. Department of the Air Force,* 864 F. Supp. 265, 289-93 (Dist.NH 1994) ("The statute expressly forbids the transfer by deed of contaminated property without remedial measures in place which have proven to be successful"), *rev'd in part on other grounds*, 79 F.3d 1250 (1st Cir. 1996)(reversed because Congress amended statutory language to exempt long term leases from § 9620(h)(3)(A)(ii) covenant requirements); *Exhibits A and B.* Defendant Army contracted its cleanup obligations to Kemron Corp., the contract specifically requiring Kemron to achieve regulatory closure of Landfill 6 & 7. *See Exhibit C.* Kemron implemented the interim containment remedy in a defective manner for which U.S. EPA suggested no covenant would be available based on the deviations from the Decision Document and Design Document. These documents relate to the decision to place an interim cap over the landfill and were subjected to notice and public comment. *See Exhibits D and E.* Defendant Army then disclaimed the obligation to seek covenants from U.S. EPA and introduced a new definition of regulatory closure "in place and working" without notice or public comment. *See Exhibit A.* Defendant Army then ceased funding U.S. EPA's participation in the cleanup process. *See Exhibit F.*

Defendant Navy was also on notice of the need for covenants but apparently decided to move forward without them and transferred property to its PPV partnership with a private developer. *See Exhibits B, G and N.*

Allowing the PPV developer to demolish existing housing and construct new housing in reliance and consideration of these illegal transfers and the flawed landfill cap implementation violates the clear and unambiguous prerequisites to transfer found in the statute and itself

represents harm to Plaintiff. *See Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972). Congress empowered citizens to sue for violations of CERCLA, thereby overriding the usual discretion of state and federal regulators and law enforcement agencies, in order to give effect to the harm from the violation itself. See 42 U.S.C. § 9659(c).

2. Harm To The Decision To Seek A Covenant From US EPA

If Defendants are allowed to continue with their irretrievable expenditure on redevelopment then there will be more internal pressure applied to U.S. EPA to factor in these expenditures if and when, at the end of this case, this Court issues a mandatory injunction requiring Defendants to seek the covenants. *See Exhibit C*, Pg. 2, Num. ¶ 4. The U.S. EPA does not regularly enforce cleanups against the federal government. *See* John F. Seymour, *Transfer Of Federal Lands: Compliance With Section 120(H) Of The Comprehensive Environmental Response, Compensation, And Liability Act*, 27 Colum. J. Envtl. L. 173, 182-83 (2002). The ongoing construction may predispose U.S. EPA to reluctantly grant the covenant to avoid wasting federal money. Because the statutory scheme withholds transfer authority until after this covenant has been issued, U.S. EPA must assess the property in its current condition, not its condition after redevelopment. *See Scherr*, 466 F.2d at 1034.

3. Harm To The Analysis For Final Remedial Action

Building new housing around Landfill 6 & 7 represents the type of irretrievable commitment of government resources which can result in a predisposition that this circuit has held to be harm to objective decision making. *See State of Wisconsin v. Caspar W. Weinberger*, 745 F.2d 412, 426-27 (7th Cir. 1984); *Scherr*, 466 F.2d at 1034. NEPA requires the government to assess all viable alternatives when a federal project is known to put the environment at risk. NEPA does not, however, require the government to choose any particular, or even the best,

course of action. It is enough that decision makers took a hard look at the available alternatives before making a decision. Where the irretrievable commitment of resources will render after the fact analysis an exercise in rationalization, a preliminary injunction is available to maintain the status quo pending the final decision on the merits. *See The State Of New York v. The Nuclear Regulatory Commission*, 550 F.2d 745, 753-55 (2nd Cir. 1977); *State of Wisconsin*, 745 F.2d at 426-27; *Scherr*, 466 F.2d at 1034.

There is admittedly little case law regarding section 9620(h)(3) requirements in general and none analogizing the harm to decision making under NEPA to the harm to decision making under CERCLA. The lack of prior litigation, however, does not mean this Court is on shaky ground in adopting this analogy or granting Plaintiff relief. The statutory language in § 9620(h)(3) is so clear that there may have been little prior opportunity for the federal government to test for ambiguity. In fact, as will be discussed in the section on likelihood of success on the merits there is little ambiguity in this case. The Defendants in this case simply find themselves in a position where they have acted illegally and the cost of compliance is so high they continue forward with their course of action.

Like in the case of NEPA, CERCLA mandates that the various feasible alternatives be developed and analyzed prior to choosing a course of action. Unlike NEPA, CERCLA sets standards for selecting the "right" alternative by setting objective standards for evaluating and comparing all the feasible alternatives. This distinction between NEPA and CERCLA strengthens the harm to the decision making process under CERCLA. Under NEPA the harm from irretrievable commitment of resources is only the creation of a predisposition towards the ongoing project whereas in CERCLA the harm is to both the creation of a predisposition towards the ongoing project and also the likelihood of accepting a less desirable choice because the

ongoing project changes the facts upon which to apply the objective criteria. In this case, the proximity of the ongoing demolition and construction to Landfill 6 & 7 at Fort Sheridan will predispose the Army towards containment instead of excavation during the analysis of feasible alternatives in the final remediation decision.

B. Defendants Harm From An Erroneous Grant Of Preliminary Injunction Is Minor

The only harm Defendants will suffer is a time delay in demolition and construction during this Court's review of the administrative record. The Defendant's need for new housing stock is real, albeit not so pressing to justify denying Plaintiff a preliminary injunction. Evidence of this is the fact that the Army transferred this property by deed to the Navy in 1993 yet Defendant Navy waited until December of 2005 to begin redeveloping the property. It is hard to imagine the hardship that a delay of three to nine months will bring to the Navy pending this Court's proceeding when the need was not so pressing for 12 years.

Whatever harm will befall Defendants from issuance of a preliminary injunction, however, is of its own making. Defendants knew of these statutory prerequisites to transfer, knowingly violated the requirements, and changed the definition of regulatory closure without notice to the public or opportunity to comment. Furthermore, the Defendants have been on actual notice of this lawsuit since February 27, 2006 when Plaintiff sent the required sixty-day prior notice of intent to sue. *See Exhibit H.* Knowing full well the risk of an injunction at the end of this case, Defendants began demolishing current housing in reliance on the defective transfers in July of 2006. *See Exhibit I.*

C. Plaintiff's Likelihood Of Success On The Merits Is Great

The transfer of contaminated federal property in 1993 and 2005 at the former Fort Sheridan, without having completed all remedial action, obtaining the required covenant from

U.S. EPA warranting that an implemented final remedial action is operating properly and successfully, or consulting with U.S. EPA on the leases are per se violations of the clear statutory language of § 9620(h)(3)(A)-(B).

Furthermore, although not an element of the violations, Plaintiff offers proof that Defendant's motivation for sidestepping the prerequisite covenants was its substantial deviation from the interim remedy Decision Document which U.S. EPA indicated an unwillingness to overlook in any request for the required covenants. *See Exhibit E*

Finally, Defendants have no defenses to these violations because the statute itself denies the Army any rulemaking authority to change the standards or guidelines that the Administrator, i.e. U.S. EPA promulgates.

The elements of the violation for deed transfer requirements under § 9620(h)(3)(A)-(B) are 1) a transfer by deed 2) of contaminated 3) federal property 4) without completing all remedial action 5) or obtaining a covenant from U.S. EPA warranting that all remedial action has been taken and demonstrated to be operating properly and successfully. The elements of the violation for consultation requirements under § 9620(h)(3)(B) are 1) a lease 2) of contaminated 3) federal property 4) without consulting with U.S. EPA that the intended use is consistent with protection of human health and the environment.

Exhibit J contains the deed transfer documents that Plaintiff requested from Defendant through a FOIA request. These show that the Navy purchased from the Army 206 acres of land, including Landfill 6 & 7, and the property was transferred by deed in 1993. *Exhibit G* contains documents provided to the public by the Navy showing the intent of the Navy to form a PPV called Midwest Family Housing, LLC. with Forest City Military Communities, LLC. and to transfer 35 acres of property by deed to the PPV. Because discovery has not started in this case

and because Defendant Navy has not yet responded to Plaintiff's recent FOIA request for the 2005 deed and lease transfer documents it is only upon information and belief that the transfers did actually occur as planned. Defendant Navy's PPV partner has, however, reached out to the local media and indicated that the project is moving forward so it is reasonable to believe that the 35 acres south of Landfill 6 & 7 was transferred to the PPV by deed and the rest of the Navy property north of Landfill 6 & 7 was transferred by lease. *See Exhibit I.*

Landfill 6 & 7 is contaminated federal property. *See Exhibit F.* As the U.S. EPA indicates, this is a Superfund-Caliber landfill. The land adjacent to Landfill 6 & 7 is also contaminated federal property. During the public comments for the interim action which led to the current landfill cap, the Army stated that the Navy personnel living in the housing adjacent to the landfill were rotated out of the housing every five years because vinyl chloride gas was being emitted into the adjacent housing and the Army and Navy apparently felt that cumulative exposure to vinyl chloride gas only became dangerous at the five year mark. *See Exhibit K,* Comment and Response 1-2. The administrative record does not contain documents that formed the basis upon which this decision to rotate personnel in and out of the housing was made although the administrative record is supposed to contain all such information. See 40 C.F.R. §300.810 (1999).

§9620(h)(3)(A) requires covenants for property on which any hazardous substance was released. CERCLA section 101(22) defines "release" as any "...spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." Defendant's admission that vinyl chloride emission from the adjacent Landfill 6 & 7 was the reason for this rotation policy is enough to require covenants prior to transfer of the adjacent property.

The property transferred by deed from the Army to the Navy in 1993 and then from the Navy to the PPV in 2005, and the property transferred by lease from the Navy to the PPV in 2005 is all part of the former Fort Sheridan and is therefore federal property.

No final remedial action has been proposed for Landfill 6 & 7 as of the date of this brief and therefore no final remedial action has been taken. It is only because there is no documentary evidence available to prove a negative that this is asserted upon information and belief. Defendants should be willing to stipulate that it is true no final remedial action has yet been proposed or implemented as CERCLA defines remedial action.

No covenants have been issued because no final remedial action has been taken to which U.S. EPA could warrant as complete and operating properly and successfully. Furthermore, *Exhibit L* is correspondence with U.S. EPA Region 5 indicating that as of September 2005 it had not been consulted as required by 9620(h)(3)(B). Finally, the Army issued what appears to be a new rule, without public notice or comment, changing the definition of regulatory closure for Landfill 6 & 7 and thereby forgoing the required covenants. *See Exhibit A.*

In addition to facts outlined above proving the per se violations, this Court should take notice of the underlying reason for Defendants' violations. The motive underlying the Army's decision to forego obtaining the required covenants from U.S. EPA is that the Army's implementation of the interim cap was so flawed that U.S. EPA stated they would probably not have signed onto it in the first place, would likely not concur with the interim remedy being proposed as the final remedy, and would probably not issue the required covenants. *See Exhibit E.*

The Decision Document, which was supported by public notice and comment, and the final Design Document called for a geocomposite liner to be rolled over the landfill and for

several feet of soil to be placed and compacted over the liner. The purpose of this liner was to divert rainwater to the sides of the landfill instead of allowing the water to infiltrate the landfill and mix with the hazardous waste. Additionally, the liner was supposed to direct any landfill gas, including the carcinogenic vinyl chloride gas, to a flaring system to be burned off. The Army was supposed to use screened soil over the geocomposite liner such that the screening would remove all rocks and clay boulders greater than 2" in diameter.

Instead, the Army used unscreened soil with rocks and clay boulders greater than 6" in diameter. This caused friction between the Army and U.S. EPA with the latter stating that the danger is the boulders either piercing or thinning the liner, or creating divots that would retain water, possibly through the freeze/thaw cycle, and degrade the liner such that it would not properly keep rainwater out or the landfill gasses contained. *See Exhibit E.* The Army hired a company to manually pick rocks out of the soil and requested U.S. EPA to concur that this met the spirit of the Design Document. *See Exhibit D.* Between the time of this request and U.S. EPA's refusal, the Army issued the new definition of regulatory closure. *See Exhibit A.* The new definition, "in place and working" replaced operating properly and successfully.

Because neither U.S. EPA nor any environmental literature recognize "in place and working", the Army was free to declare victory and the Navy was free to start redevelopment. *See Exhibit M.* The Army stopped funding U.S. EPA's participation in October 2003, about a week after the U.S EPA letter stating that no concurrence would be forthcoming without further explanation by the Army for the deviations in implementation of the cap. *See Exhibits E and F.*

The ultimate harm from these violations is that but/for the proper and successful operation of a final remedy, Landfill 6 & 7 would still be emitting carcinogenic vinyl chloride gas onto the adjacent property. If, as indicated by U.S. EPA in *Exhibit E* the cap is not operating

properly and successfully, then emissions will once again poison the adjacent property and its residents. This adjacent property is the same that the Navy and its PPV partner appear to be in a mad dash to develop.

Applying the above factors to the *American Hospital* formula, the high likelihood of success (P=.90) and the high degree of harm to Plaintiff in erroneously denying a preliminary injunction greatly offsets Defendant's minimal likelihood of success on the merits (1-P=.10) and small harm from erroneous grant of preliminary injunction to Plaintiff. Plaintiff is very likely to succeed on the merits because all Defendants' violations of § 9620(h)(3) are provable by documents upon which Defendants based their decisions.

D. The Public Interest Is Best Served By Granting Plaintiff An Injunction

Because this is a private attorney general action under the citizen suit provision to enforce the will of Congress under CERCLA, the public interest is being served by this suit. The public also has an interest in providing our Navy personnel with adequate housing but that housing should be afforded the protection of a consultation with U.S. EPA as to the adequacy of the leased property for the purposes proposed. The public interest is best served by requiring the Defendants to adhere to the requirements of § 9620(h)(3) and in enjoining continued redevelopment until they do.

E. This Is An Administrative Review Case Satisfying The *Cronin* Test

Under *Cronin*, Plaintiff's complaint represents one of the three types of administrative review cases warranting a preliminary injunction. 919 F.2d at 446. This Court should grant a preliminary injunction even though the final judgment will likely be a review of the administrative record without trial because the administrative record is so vast and complicated that it is likely Plaintiff will be harmed due to delay. Proof of this size and complexity can be

inferred by Defendant's request for an additional 60 days to reply to Plaintiff's complaint. This case may also require an evidentiary hearing to reconstruct the ground or contents of the agency's decision.

As stated, Defendants did not add all documents to the administrative record with information forming the basis for its decisions. Specifically, the decision to rotate personnel in the housing adjacent to Landfill 6 & 7 because of vinyl chloride gas emissions and the decision to change the definition of regulatory closure from a covenant from U.S. EPA to "in place and working" do not have any supporting documentation in the record. The absence of these supporting documents do not change the presumption raised by the available documents that all the adjacent property is contaminated federal property.

The decision to change the definition of regulatory closure is invalid on its face because the Army has no rulemaking authority under CERCLA. Section 120 of CERCLA provides that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . . " See 42 U.S.C. § 9620(a)(1). The statute further provides that "[n]o department, agency, or instrumentality of the United States may adopt or utilize any [ ] guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations and criteria established by the Administrator," – i.e., "the Administrator of the United States Environmental Protection Agency." § 9620(a)(2), § 9601(2).

These are clear statements of Congressional intent to deprive the Army of delegated authority to make rules with the force of law or to engage in notice and comment rulemaking. The decision to change the definition of regulatory closure should therefore be entitled to no deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (U.S. 2001). The absence of

supporting rulemaking documents does not affect this request for preliminary injunction. Defendants may want to introduce the supporting documents, however, to prove rulemaking authority and may seek evidentiary hearings or reconstruction of the administrative record as mentioned in *Cronin*. This type of delay will cause more harm to Plaintiff without a preliminary injunction.

II. PLAINTIFF SHOULD NOT BE REQUIRED TO POST A BOND BECAUSE IT WOULD DENY MEANINGFUL ACCESS TO JUDICIAL RELIEF

Plaintiff requests that this Court set either no bond or a nominal bond in accordance with Rule 65(c) of the Federal Rules of Civil Procedure which make a bond mandatory yet discretionary. Notwithstanding the mandatory language of the rule, this circuit has recognized the discretion of district judges to either waive the requirement or allow the posting of nominal bond. *See Cronin*, 919 F.2d at 445; *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (cited in *Cronin*); *Scherr*, 466 F.2d at 1035. Plaintiff has no money at stake in this case and is an individual merely enforcing his rights to a clean environment under the citizen suit provision of CERCLA. To require any more than a nominal bond would cause Plaintiff to withdraw this motion and deny Plaintiff meaningful access to judicial relief.

Respectfully submitted,

_____

Steven B. Pollack

NON-RESPONSIVE

pro se plaintiff

CERTIFICATE OF SERVICE

The undersigned pro se plaintiff hereby certifies that in accordance with Fed. R. Civ. P. 5, LR5.5, the following documents:

Motion For Temporary Restraining Order And/Or Preliminary Injunction

Brief In Support Of Plaintiff's Motion For A Temporary Restraining Order And/Or Preliminary Injunction

Were sent by first-class mail on August 3, 2006 to the following:

Laurel A. Bedig
Trial Attorney, U.S. Department of Justice
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By _____
Steven B. Pollack
pro se plaintiff

NON-RESPONSIVE